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Class Actions: The Right to Solicit

Charles D. Schoor

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INTRODUCTION

Although the assistance of an attorney is frequently a necessity in a bureaucratic society, securing that assistance can present obstacles as serious as the problem for which the attorney is needed. Canon 2 of the American Bar Association's Code of Professional Responsibility sets out the lawyer's duty to "assist the legal profession in fulfilling its duty to make legal counsel available."[1] However, the Code narrowly limits the manner in which this obligation can be fulfilled; solicitation of clients by attorneys is strictly prohibited.[2] The restriction is designed to minimize any connection between assisting laymen "to recognize legal problems [that] may not be self-revealing" and improper "personal"—presumably pecuniary—motives of

* B.S., 1968, University of Pennsylvania; M.S., 1970, University of California, Los Angeles; J.D., 1975, University of Southern California; Member, California Bar.

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2 (1971) [hereinafter the Ethical Considerations will be cited as ABA CODE, E.C., and the Disciplinary Rules as ABA CODE, D.R.].

ABA CODE, E.C. 2-1 (footnotes omitted) provides in part: "The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel."

2. American Bar Association Disciplinary Rules do permit a limited amount of *indirect* solicitation, to the extent that attorneys are permitted to make themselves available to and accept referrals from (1) lawyer referral services sponsored or approved by the local bar association; (2) certain legal aid organizations; (3) a military legal assistance office; (4) a "non-profit organization that recommends, furnishes or pays for legal services to its members or beneficiaries." ABA CODE, D.R. 2-103(D). This is an acknowledgment of and adaptation to the Supreme Court ruling in NAACP v. Button, 371 U.S. 415 (1963), and subsequent cases dealing with solicitation in the context of first amendment rights. *See* text accompanying notes 23-36. *See also* Belli v. State Bar, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527 (1974), for an analysis of the constitutional considerations involved when an attorney publicizes lecture tours and other subsidiary activities that may have the effect of promoting his private practice.

On February 17, 1976, the ABA House of Delegates voted to allow attorneys to list in the classified section of telephone directories their initial consultation fees, credit arrangements, and areas of specialty. ABA Press Release No. 021776 (Feb. 17, 1976).

the attorney rendering such aid.[3] Thus, Ethical Consideration 2-3 asserts:

> The advice [to seek legal services] is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. *Obviously, a lawyer should not contact a non-client, directly, or indirectly, for the purpose of being retained to represent him for compensation.*[4]

Clearly, there is opportunity for abuse if the lawyer has personal reasons for offering his legal services. But it does not necessarily follow that this potential abuse can be prevented only by outright prohibition of all solicitation; there may well be other adequate safeguards.

The case against solicitation is a substantial one. Recently, however, there has been some commentary on the availability and even the constitutional necessity of less restrictive means for preventing potential abuses.[5] It has been argued that the evils of solicitation can be avoided without sacrificing the increased information and access to the courts that solicitation would produce. Indeed, some commentators have suggested that recent Supreme Court opinions require the invalidation of the present broad anti-solicitation rules.

The constitutional and case law arguments for permitting solicitation have merit; however, they involve a significant extension of the applicable Supreme Court cases. The purpose of this article is to set forth a middle position: if the courts are unwilling to eliminate all restrictions on solicitation, an acceptable intermediate step would be to abolish the rules in the class action context, an area in which existing judicial procedures can easily be modified to curb any potential or actual misconduct. In addition, this position, which may be required by the Supreme Court cases, would provide a limited and controlled context in which the arguments for and against solicitation could be empirically tested. This proposal will be developed

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3. ABA CODE, E.C. 2-2.

4. *Id.* 2-3 (emphasis added).

5. *See* Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 77 (1973); Note, *Advertising, Solicitation and the Professional Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

and its feasibility examined, with analysis focusing on the American Bar Association's Code of Professional Responsibility and the class action rule, Rule 23 of the Federal Rules of Civil Procedure. The discussion is applicable to class action litigation under the rules of the individual states to the extent that state procedures and protections are similar to those embodied in Rule 23.

I. CLASS ACTIONS

Class Actions Under Rule 23

The class action is a special kind of joinder device. It allows one or more persons to sue or defend on behalf of themselves and all other persons similarly situated. "The unique characteristic of a class action is that a determination made in respect of self-constituted representatives of a group is, or at least purports to be, binding for or against the absent members of the group."[6]

Rule 23 of the Federal Rules of Civil Procedure contemplates three different varieties of class actions. A suit can qualify as a class action if it meets the prerequisite of section 23(a) and the requirements of either 23(b)(1), 23(b)(2) or 23(b)(3).[7]

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6. D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE 827 (3d ed. 1973).

7. FED. R. CIV. P. 23 provides in part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Section 23(b)(1) permits a class action to be brought when the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent judgments against the party opposing the class, or a risk of a judgment against an individual member of the class which, as a practical matter, would impair the rights of other class members not party to the present suit. In these situations, the single class action is advantageous because it eliminates any potential inconsistency and protects the rights of all parties who will be affected by the outcome.

Section 23(b)(2) authorizes a class action when a party opponent has engaged in the same sort of conduct toward all members of the class. In this situation, injunctive or declaratory relief for the whole class is appropriate. The class suit allows resolution for all persons affected, without the necessity of multiple suits on the same fact situation.

The third type of class action is authorized by section 23(b)(3). In this type of action, there are questions of fact or law common to the class members which predominate over any questions affecting only the individual members, and the class action is the best available method to adjudicate the controversy.[8]

An analysis of the Rule 23 categories indicates that the class action is intended to promote judicial efficiency and uniformity of decision. A third rationale, particularly for the 23(b)(3) action, is that the rule provides a forum to persons whose individual claims against the defendant are too small to litigate separately. The class action offers a remedy where there is no practical alternative. In addition, the possibility of consol-

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(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

8. For a discussion of the rationale underlying the rules and examples of the different types of class action suits, *see Notes of the Advisory Committee on Rules*, 39 F.R.D. 69, 98-104 (1966).

idating numerous small claims deters certain types of misconduct, since it provides individuals with an economically feasible method of policing. Exploitative practices which inflict minor economic injury on a large number of people—but which represent in the aggregate enormous gains for the wrongdoer—can be halted by one or two individuals acting as "private attorneys general."[9]

To be sure, the "provision of forum" theory has been controversial.[10] The Supreme Court has determined that in the federal courts, every class member,[11] and not just one named plaintiff,[12] must meet any applicable jurisdictional amount requirement,[13] on the ground that such requirements embody a legislative policy to keep small plaintiffs out of federal court. But in many types of cases there are no jurisdictional amount requirements (for instance, securities,[14] antitrust,[15] and certain civil rights actions[16]). The argument from legislative silence is always a risky one at best, but presumably the absence of a jurisdictional amount requirement in such cases indicates no legislative policy against the small-claim plaintiff, and offers a field of operation for the Rule 23(b)(3) class action.

Reasons to Encourage Solicitation

In order to determine whether solicitation of class actions is desirable, it is necessary, first, to determine whether solicita-

9. For a discussion of use of the class action to deter corporate wrongdoing, *see* Moore, *The Potential Function of the Modern Class Suit*, 2 CLASS ACTION REP. 47 (1973). The usefulness of the private attorney general rationale, in both class and individual actions, has been seriously impaired by the United States Supreme Court's opinion in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612 (1975). The Court's decision that, in the federal courts, attorneys' fees will be available to successful plaintiffs on a private attorney general theory only if specifically provided for by statute may increase the economic squeeze and discourage policing actions by consumers. *See* Comment, *After Alyeska: Will Public Interest Litigation Survive?*, 16 SANTA CLARA L. REV. 267 (1975). However, plaintiffs whose class action suits result in substantial damage awards in which other class members are entitled to share will usually be reimbursed for attorneys' fees under the "common fund" doctrine. *Id.* at 274; *see* text accompanying note 53 *infra*.

10. For a discussion of the emergence of this third purpose and its potential conflict with the purposes of efficiency and uniformity of decision, *see* Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. IND. & COM. L. REV. 515 (1969).

11. Zahn v. International Paper Co., 414 U.S. 291 (1973).

12. Snyder v. Harris, 394 U.S. 332 (1969).

13. *E.g.*, 28 U.S.C. § 1332 (1970).

14. 15 *id.* § 78aa.

15. 28 *id.* § 1337.

16. *Id.* § 1343.

tion would interfere with the apparent purposes for class actions (judicial economy, uniformity of decision, and provision of forum); and second, whether the nature of the class action makes it a peculiarly appropriate context for solicitation.[17]

There are three basic kinds of solicitation in regard to class actions: solicitation of the entire suit, including the first named plaintiff; solicitation of additional named plaintiffs for a class action that has already been initiated; and solicitation of direct representation of an unnamed member of an existing class action.

With regard to the latter two types of solicitation, the solicited plaintiffs would be class members even if they had not been induced to become named plaintiffs or accept direct representation. They would be in the forum and bound by the judgment, unless they chose to opt out where such a choice was available.[18] No new suits would be brought as a consequence of solicitation, and no separate suits would be consolidated. The effect of these kinds of solicitation on judicial economy, uniformity of decision and forum provision would be small.

The effects of solicitation would be most direct and obvious when the entire action, including the first named plaintiff, is solicited—a situation that resembles solicitation of an individual suit. For purposes of analysis, we can divide these class actions into three categories: those suits that would not have been brought at all without the solicitation; those suits that would have been brought individually if the class action were not solicited; and those that would have been brought as class actions in any event.

As to those suits that would not have been brought at all, economy, in the sense of overall costs, is certainly not enhanced by encouraging litigation that would otherwise not occur. In addition, solicitation of these suits would not contribute to consistent application and development of the law, because by definition, no decisions would have been forthcoming. But there is a more important question: why would these suits not have been brought? If it is because the potential plaintiff was unaware of his rights, then surely no policy of keeping persons uninformed can be offered in support of the anti-solicitation

17. For statements of the existing arguments for advertising and solicitation in the general case, *see* comments cited note 5 *supra*.

18. FED. R. CIV. P. 23(c)(2) provides a method for opting out of a Rule 23(b)(3) class action.

rule. On the contrary, the ABA's Code of Professional Responsibility imposes on attorneys an ethical duty to increase the level of rights-awareness in the general public.[19] Solicitation would encourage such awareness. If the suit would not have been brought because the potential plaintiff did not want to litigate (for reasons other than the cost of litigating), exposing him to an honest presentation of the arguments in favor of legal action should not be barred. Litigation of justifiable claims is not, of itself, an evil. The potential plaintiff obviously cannot be compelled to accept the advice to litigate; solicitation would merely make him aware of an alternative course and, again, encourage rights-awareness. Finally, if the suit would not have been brought because the costs would be too high in light of the possible or probable recovery, solicitation would operate in direct support of the provision-of-forum purpose of class actions.

Solicitation of class actions that would not have been brought otherwise does increase litigation in the courts. But in evaluating the desirability of the alternatives, we must consider the basic goals of a judicial system. As discussed more fully subsequently,[20] reduction of the costs of a court system should be secondary to the redress of justifiable grievances.[21]

In the case of class suits that would have been brought as individual suits if the class action were not solicited, judicial economy would probably be served and consistent adjudications promoted, because solicitation would encourage the litigants to join in one action. The accessability of a forum would neither be increased nor decreased, but cost to litigants would be reduced by the economies of scale.

Finally, there are the cases in which a class action would have been brought even without solicitation. Here, the pur-

19. "The legal profession should assist laymen to recognize legal problems because such problems may not be self revealing and often are not timely noticed." ABA CODE, E.C. 2-2.

20. *See* text accompanying notes 89-92 *infra*.

21. It should be noted that increase of rights-awareness and stimulation of information flow would be encouraged by solicitation, whether it be solicitation of class or individual actions, but the increase in access to the forum would be much more extensive in class actions. Those who will benefit most from the freer flow of information are those who do not have regular access to an attorney; these people are usually the poor and the middle class whose claims tend to be relatively small. The costs of litigation will usually prevent these people from individually bringing suit, even if they are aware of their rights. Solicitation would inform these people of their rights, and the class action would provide them with access to a forum where their claims can be economically adjudicated.

poses of the class action rule[22] clearly would be served in any event, and permitting solicitation would offer only the additional advantage that solicitation might provide in individual suits: increased rights-awareness, freer flow of information and, perhaps, lower prices for legal services because of increased competition. But there is a bonus: the special protections of the class action rule offer built-in protection against abuses that might go unregulated in the solicitation of individual actions.

Thus, there are several reasons to encourage solicitation of class actions; three of them—increased rights-awareness, freer access to information, and price competition—are equally valid in the context of the individual suit. But solicitation of class actions has an additional advantage in that it spreads the benefits to a larger proportion of the population and promotes an economical method of redress. Futhermore, recent Supreme Court cases indicate the anti-solicitation rules may under certain circumstances violate first amendment rights. These cases have particular significance in a group context, where the right to assemble augments and is interwoven with free speech rights. And finally, the federal class action rule can be used to prevent those potential evils and abuses most frequently cited as likely to result from any relaxation of the current anti-solicitation rules. These last two factors, peculiar to the class action situation, will now be analyzed in detail.

II. Solicitation and the First Amendment

The Supreme Court has held that some kinds of solicitation are protected by the first amendment.[23] In a series of four decisions beginning with *NAACP v. Button*,[24] the Court has upheld the right of certain associations to contact individuals[25] about possible litigation and to direct these potential litigants to attorneys recommended or actually employed by the association.

In *Button*, the Court struck down a Virginia statute which was construed to prohibit the NAACP from advising prospective litigants that their legal rights had been infringed, and from referring them to the NAACP legal offices for representa-

22. *See* text accompanying notes 8-16 *supra*.

23. NAACP v. Button, 371 U.S. 415, 429 (1963).

24. 371 U.S. 415 (1963).

25. In *Button*, the NAACP directed their solicitation toward both NAACP members and non-members. *Id.* at 422.

tion. In *Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar*,[26] the Court found a violation of the first and fourteenth amendments in an injunction which restrained the Brotherhood from advising injured workers to seek out legal representation and from recommending particular attorneys to them. A third case, *United Mine Workers of America v. Illinois State Bar Association*,[27] upheld a union's right to hire its own attorney to prosecute workmen's compensation claims and to provide injured workers with forms which they were advised to submit to the union's legal department. The forms constituted authorization for the union's attorney to file a claim on behalf of the injured workman. Finally, in *United Transportation Union v. State Bar of Michigan*,[28] the Court upheld a union's right to recommend specific attorneys to its members. The recommended attorneys had agreed with the union that they would prosecute FELA[29] claims for a fee totaling no more than 25 percent of the recovery.

In each of these cases, the Court held that no compelling state interest could be found to support anti-solicitation regulations which infringed on fundamental first amendment rights of speech and association. As each succeeding case came before the Court, the state bar involved attempted to narrowly distinguish the preceding cases on their facts. But the Supreme Court refused to read the holdings narrowly. In *United Mine Workers*, the Court specifically held that *Button* was not limited to litigation concerned with political expression, and that the *Trainmen* rule was not limited to the recommendation of specific outside attorneys but encompassed the right of an organization to hire its own attorney and then recommend that attorney to its members.[30]

In *United Transportation Union*, the Court announced the broad principles involved:

> In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the pro-

26. 377 U.S. 1 (1964).
27. 389 U.S. 217 (1967).
28. 401 U.S. 576 (1971).
29. Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.* (1970).
30. 389 U.S. at 221.

> tection of freedom guaranteed by the Constitution. *The common thread running through our decisions in* NAACP v. Button, Trainmen, *and* United Mine Workers *is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.* That was the holding in *United Mine Workers, Trainmen*, and *NAACP v. Button*.[31]

There has been commentary which utilizes the *Button* series of cases to suggest that the principles involved are applicable to situations in which individuals rather than special groups are the solicitors.[32] One commentator argues that collective activity is not the key to the holdings.[33] The fact is, however, that in the cases decided thus far, association to obtain access to the courts has been a central element. Certainly, an individual's need for increased access to the courts does not depend on whether he is a member of a group. But in the evolution of constitutional rights, there may be reasons for making this type of distinction—reasons which led the court to focus on the right of association of the potential litigants, and not on the associational rights of the attorney and his prospective clients.

In the course of its several opinions, the Court looked at both the first amendment interests to be protected and the interests of the state in regulating solicitation. The state interests were found not sufficient to justify the broad prohibitions at issue. Justice Harlan, dissenting in *United Mine Workers*, characterized the Court's comparison of the state's interests with the association's interests as a balancing process, and distinguished this from the "absolute" approach in first amendment cases that some members of the court had taken in the past.[34] Justice Harlan found himself in agreement with the balancing approach, but not with the result: he argued that the state's interests justified the prohibition.

If the Court was indeed weighing the states' interests in anti-solicitation rules against the litigants' interest in im-

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31. 401 U.S. at 585-86 (emphasis added).

32. *See* comments cited note 5 *supra*.

33. Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 87 (1973).

34. 389 U.S. at 227.

proved access to the courts, then the importance of the group aspect of the decisions may, perhaps, be found by focusing on the states' interests rather than those of prospective plaintiffs. The Court, divided as it was, may have been reluctant to abandon entirely rules prohibiting solicitation, and have sought instead, in the group context, an alternative means for achieving the states' interests while still undercutting the traditional solicitation ban.

This appears more clearly when we examine the purposes of the solicitation and the nature of the group in each of the cases. In *Button*, the soliciting group was the National Association for the Advancement of Colored People. The Court stated that the basic aims and purposes of the NAACP were "to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States."[35] The NAACP was soliciting black citizens to serve as litigants in cases involving racial discrimination and school integration. In each of the other three cases, the soliciting group was a labor union. The broad purpose of this solicitation was to provide injured union members with the opportunity to obtain more effective legal aid in pressing their claims for compensation. Thus, in all four cases the group functioned, in effect, as a service organization for its members, the persons being solicited. The *raison d'etre* of the soliciting group was to increase its members' ability to achieve common interests.

The Supreme Court may have viewed the group as implementing the interests of both the potential litigants and the state. On the one hand, the group provided the increased access to the courts which solicitation would promote and which the group desired; on the other, it stood ready to protect its members from abuses of solicitation. It was in the association's own self interest to provide quality legal services and to assure that its members were not subjected to fraudulent practices. This perhaps explains the Court's conclusion in each case that the value of the solicitation activities outweighed the state's interest in enforcing its anti-solicitation rules: the group *itself* provided the protection and regulation that was the essence of the interest asserted by the state. Metaphorically, the existence of the group was not so much an added weight on the litigants'

35. 371 U.S. at 419.

side of the balance as a decrease on the state's side. Where there exists an efficient protective mechanism *without* state intervention, it is perhaps more difficult for the state to establish that its need to safeguard solicitees is indeed compelling. This would further explain why the Court announced the first amendment rights in terms of "*collective* activity undertaken to obtain meaningful access to the courts."[36] It would also provide a divided court with an opportunity to experiment with limited solicitation practices before determining whether broad anti-solicitation rules are in fact necessary to implement a legitimate state interest in the public welfare.

How, then, does solicitation of a class action by a private attorney fit into this structure?

In the solicitation of class actions, the potential litigants have common interests which can be fostered by the formation of a group, just as those litigants in the *Button* line of cases did. But there is frequently no sufficient incentive for anyone to form an "association," particularly when each potential litigant's claim is small. The common interest of the group is temporary and discrete; the existence of a common interest group may well be unknown to most of its members; and the sole reason for an association would be to pursue one particular law suit. Unlike a labor union or the NAACP, the association would cease to exist once litigation was completed.

The soliciting attorney, however, does stand to benefit from the effort to form an association. His incentive is the fee, which will frequently exceed any single plaintiff's claim. When an attorney solicits a class action he is in effect attempting to form an association which, although amorphous and temporary, will nevertheless resemble, in its "common interest" focus, the labor union in the Supreme Court cases. Of course, in the solicitation of a class action, the attorney's interests do not usually coincide with those of the class, and he clearly does not have the kind of interest that the labor unions did in protecting group members from abuses of solicitation. But in the case of a class action, this protective function can be achieved independently. The strictures of Rule 23 of the Federal Rules of Civil Procedure, together with the broad supervisory powers it confers on the courts, make the class action rule an excellent

36. United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971) (emphasis added).

mechanism for ensuring that the state's obligation to protect the potential solicitee is discharged.

If the Supreme Court is not yet ready to extend first amendment protection to all types of solicitation activities—if it chooses, rather, to tread this path one step at a time—then solicitation of class actions is the next logical step. It implements the rationale of the *Button* line of cases while achieving a proper balance between freer information flow and prevention of abuses.

III. The Effects of Solicitation and the Prevention of Abuses

What are the dangers presented by solicitation, and how does the class action rule protect against these dangers? A useful way to evaluate the anti-solicitation arguments is to examine the alleged detrimental effects of solicitation on the various parties involved. The process reveals that reasonable arguments in favor of solicitation become still stronger in the context of a class action governed by Rule 23, and that some potential ill effects are obviated either by the protections made available under the rule, or by the nature of the class action itself. The effects on plaintiffs, defendants, courts, the legal profession, and the general public are discussed separately.[37]

Plaintiffs

Rule 23(a)(4): The "puffing" problem. Rules prohibiting solicitation are often defended as offering potential clients protection against misrepresentation.[38] It is assumed that a lawyer soliciting a client will be more likely to overstate his ability (called "puffing") and accept a case he cannot competently manage than a lawyer who is sought out by a client. Puffing may result in increased costs for overvalued services, and meritorious claims may be defeated because of unskillful handling. In addition, the image and dignity of the profession suffer.

The Code of Professional Responsibility recognizes that the selection of an attorney was an easier task in the past, when

37. Because this article is concerned primarily with solicitation of class actions, the discussion of solicitation practices focuses on the litigation context. Non-litigation solicitation, *e.g.*, clients solicited for estate planning or for periodic legal "checkups," is not considered.

38. *See* B. Christensen, Lawyers for People of Moderate Means 140 (1970) [hereinafter cited as B. Christensen].

the client knew the reputations of local attorneys.[39] Today, a more transient society and an increasingly complex and specialized system of law make the selection process more difficult.[40] Of course, an attorney may yield to the temptation to overstate his expertise when the client seeks the attorney, but assuming arguendo that a competitive atmosphere in which attorneys openly vie for clients does indeed encourage puffing, Rule 23(a)(4) can be used to provide protection to a potential client in a class action situation.

Rule 23(a)(4) states one of the four prerequisites for maintaining a class action: "the representative parties [must] fairly and adequately protect the interests of the class." Any trial judge who is not satisfied that this requirement is met can refuse to certify the suit as a class action. The ability of the representative to protect the class interests[41] is a crucial factor because of the binding effect of a judgment on all class members. Representation cannot be adequate if the attorney for the named plaintiffs is unable to manage the suit.

There are many reported cases in which the adequacy of counsel has been subjected to close examination. For example, in *Walker v. Columbia University*,[42] the court denied class action status to the plaintiffs because their attorneys failed to make the motion for class status quickly, as required by a local rule. The court concluded that this failure in the face of an unambiguous rule indicated that the attorneys would not fairly and adequately protect the interests of the class in accordance with Rule 23(a)(4).[43]

In *Stavrides v. Mellon National Bank & Trust Co.*, [44] the court saw a potential ethical impropriety when it appeared that there might have been solicitation and maintenance of the suit by the plaintiffs' attorneys. The court granted a defense motion to conduct discovery to determine whether the attorneys had demonstrated ethical inadequacy. The decision articulated a broad principle of judicial responsibility in class actions:

> In assessing the ability of the plaintiffs' counsel to carry out his fiduciary duties to absent class members we think

39. ABA CODE, E.C. 2-6.

40. *Id.* 2-7.

41. Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. IND. & COM. L. REV. 535 (1969).

42. 62 F.R.D. 63 (S.D.N.Y. 1973).

43. *Id.* at 64.

44. 60 F.R.D. 634 (W.D. Pa. 1973).

> the court should use its "broad administrative, as well as adjudicative power" as "guardian of the rights of the absentees" to see that the absentees are represented by counsel who is ethically as well as intellectually competent to represent them.[45]

This principle is applicable to situations such as puffing that are more truly detrimental to the plaintiffs' interests than the alleged misconduct in *Stavrides*. Nor is it only the exceptional case in which courts have felt compelled to examine the qualifications of the plaintiffs' attorneys in applying Rule 23(a)(4).[46]

If solicitation rules were liberalized in the class action context, judges would need to be even more active in their perusal of an attorney's qualifications when he represented a class. This is not to suggest that judges should act as a rating bureau for lawyers. Rather, the mechanism can be used to provide clients with adequate protection against attorneys who grossly overstate their ability. Furthermore, Rule 23(c)(1)[47] provides that the court may alter or amend the order certifying the class action. Thus, the judge may modify the order and revoke class status for failure to satisfy Rule 23(a)(4) if the attorney demonstrates incompetence during the course of the suit. Protection is thus afforded without resort to a ban on solicitation.

If the assumption that soliciting attorneys misrepresent their abilities more than non-soliciting attorneys do is incorrect, the "puffing" argument fails as a reason to prohibit solicitation; if it is accurate, Rule 23(a)(4) would act as a protection for the client. Given the uncertainty of the assumption, it is reasonable to utilize the protection which the rule offers in any event.

Rule 23(e): The "sell-out" problem. The charge is often made that soliciting attorneys will charge higher fees than non-soliciting attorneys, or that they will be more willing to settle their clients' claims for less than they are realistically worth.[48] The basis for this charge is the assumption that soliciting

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45. *Id.* at 637 (footnotes omitted).

46. *See* Cullen v. United States, 372 F. Supp. 441, 447-48 (N.D. Ill. 1974); Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 449-51 (D. Ariz. 1971).

47. FED. R. CIV. P. 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

48. Note, *Legal Ethics—Ambulance Chasing*, 30 N.Y.U.L. Rev. 185 (1955).

would, of economic necessity, reduce the practice of law to just another commercial enterprise, with increased emphasis on profit maximization and decreased emphasis on justice and the public interest. Law would become a high volume, low margin, quick turnover enterprise. The harm to the client occurs when an aggressive solicitor tries to maximize his own income by agreeing to a quick settlement of the plaintiffs' claims for an amount less than could be obtained with a greater expenditure of time and effort.

Section 23(e) states that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs." When class members receive advance notice of the proposed settlement and the court exercises its independent judgment, the possibility of the attorney selling out his clients for his own gain is greatly reduced. Courts have examined and disapproved dismissals even when both the named plaintiffs and the defendants have stipulated to the settlement. For example, in *Philadelphia Electric Co. v. Anaconda American Brass Co.*,[49] the court refused to approve a settlement of the class claims totaling more than four million dollars and acceptable to the named plaintiffs and three of the thirteen defendants, because notice had not been sent the absent class as required by Rule 23(e). No class had yet been certified, but the court assumed that the suit was a class action for purposes of dismissal or compromise under Rule 23(e). The existence of a class that can object to the settlement, and the requirement of court approval, make it harder for an attorney litigating a class action to sell the claim too cheaply, even if he can persuade his client to agree.

In *City of Detroit v. Grinnell Corp.*,[50] the United States Court of Appeals for the Second Circuit discussed the settlement approved by the district court. Although the lower court's approval of the settlement was affirmed, the appellate court did state that "[t]he Court must eschew any rubber stamp approval [of the proposed settlement] in favor of an independent evaluation."[51] The court of appeals also listed with ap-

49. 42 F.R.D. 324 (E.D. Pa. 1967). For further discussion, *see* text accompanying note 67 *infra*.

50. 495 F.2d 448 (2d Cir. 1974).

51. *Id.* at 462.

proval the factors considered by the district court in its decision to approve the settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing damages; (5) the risks of maintaining the class action through the trial; (6) the ability of the defendants to withstand a greater judgment; (7) the range of reasonableness of the settlement fund in light of the best possible recovery; (8) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[52]

Although each factor is difficult to evaluate with any degree of precision, a court, exercising its independent judgment, can disapprove any settlement that appears to be a sellout by the attorneys. Thus, the class action rule again provides protection to solicited (and unsolicited) plaintiffs without prohibition of all solicitation.

A corollary concern is the enormous fees that plaintiffs' attorneys sometimes collect in class action litigation, to the detriment of both their clients and the defendants. These fees, it is claimed, are not justified by either the effort expended or the risk involved in the litigation, but constitute an unjustified extension of the contingent fee arrangement to situations beyond those envisioned when the fee arrangement was originally allowed.

Rule 23 has no fee provision. The basis for awarding attorneys' fees in class action cases is the equitable fund doctrine, which provides fair allowances for expenses and fees to those parties promoting the litigation. The doctrine is a judicially created outgrowth of the traditional equity powers of the federal courts.[53]

The courts, to fulfill their duty to guide the litigation, must scrutinize the size of the attorneys' fees award. A good example of such scrutiny can be found in the *Grinnell* decision.[54] In that case the plaintiffs' attorneys sought a fee of 1.5 million dollars. The court noted that this represented an hourly rate of $635 per attorney-hour for the 2357 hours expended. The court did not find persuasive the attorneys' attempt to justify

52. *Id.* at 463 (citations omitted).
53. *Id.* at 469.
54. *See* text accompanying note 50 *supra*.

this fee by comparing the *Grinnell* case to one in which the rate of compensation was $3,590 per hour.[55] This type of active policing of attorneys' fees would obviate much of the criticism directed at solicitation of class actions.

The Manual for Complex Litigation: Misleading communications. To this point, the objections examined and discussed apply (though not with equal validity or weight) whether the litigation is a class action or an individual suit. Because a class action includes non-formal parties—that is, class members who are not named plaintiffs—there is one aspect of solicitation peculiar to the class action. Normally, an attorney would solicit one person to initiate individual litigation. In the class action context, this is analogous to soliciting named plaintiffs for an action not yet instituted. Solicitation of the first named plaintiff seems to be clearly proscribed by the present rules,[56] and solicitation of additional named plaintiffs is also barred.[57] However, in a class action situation there may be a number of persons who have a relationship to a pending action by virtue of their status as class members. Thus, the possibility exists that attorneys conducting the class action might, after litigation had begun, contact actual or potential class members and either solicit direct representation, or attempt to set up funding or fee arrangements for the pending suit.[58]

The federal *Manual for Complex Litigation* proposes that each court

> adopt a local rule forbidding *unapproved* direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members, who are not formal parties, provided that such proposed written communications submitted to and approved by order of

55. 495 F.2d at 472-73 n.13.

56. *See, e.g.*, ABA CODE, D.R. 2-104.

57. *Id.* (a)(5). The attorney is permitted to contact but not solicit a second potential named plaintiff. ABA CODE, D.R. 2-104(a)(5) states that "[i]f success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek employment from those contacted for the purpose of obtaining this joinder." The fineness of the distinction in allowing attorneys to contact potential class members about joinder and to accept their offer of employment, but not to actively seek employment, may be difficult to maintain in practice. Consequently, this may result in increased non-sanctioned solicitation.

58. MANUAL FOR COMPLEX LITIGATION § 1.41 (1973).

> court may be distributed to the parties or parties designated or described in the court order of approval.[59]

The *Manual* acknowledges that some communication may be necessary between the attorney and the unnamed class members if the litigation is to function properly. However, the protections are deemed necessary because the existence of a pending suit presents an opportunity for the attorney to mislead class members by implying that the communication has the sanction of the court; referring to the judge by name, mentioning the title of the court, the action, or other judicial processes could easily lend a spurious "official" tone to the communication.[60]

The *Manual* does not distinguish between misleading statements by an attorney and the perceived ethical impropriety of solicitation itself. If solicitation is not inherently unethical, then prior approval by the court is useful only to the extent that it prevents misleading statements. There is some danger that a judge may prohibit statements that are not misleading, but a prior approval requirement is a less intrusive alternative than an outright ban on solicitation.

Rule 23(d)(2): Notice. There is yet another protection for class members which diminishes the need for a complete ban on solicitation of class actions. Rule 23(d)(2)[61] provides that "[i]n the conduct of actions to which this rule applies, the court may make appropriate orders . . . (2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step of the action." In *Kramer v. Scientific Control Corp.*,[62] the defendant argued that the unnamed class members would not

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59. *Id.* (emphasis in original). The Manual supports this prior restraint by reasoning that first amendment rights are to be balanced against the right to a fair trial. *Id.* n.28.

60. *Id.* § 1.41.

61. FED. R. CIV. P. 23(d)(2) provides that in the conduct of actions to which this rule applies, a court may make appropriate orders

> requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action. . . .

62. 67 F.R.D. 98 (E.D. Pa. 1975).

be adequately represented, because the named plaintiffs were the attorney for the class suit and members of his family. It was claimed that they could unfairly compromise the class claims to obtain larger attorneys' fees. The court noted that it had the final approval of any settlement under Rule 23(e), and that it could take steps to protect the absent class members from conflicts of interest by requiring appropriate notice of any proffered settlement under Rule 23(d)(2).[63]

Both the local rule proposed by the *Manual for Complex Litigation* and Rule 23(d)(2) can be used to protect actual and potential class members from any of the dangers inherent in solicitation without depriving them of the benefits to be gained by allowing attorneys actively to solicit.

Rule 23(c)(1): When is a class action a class action? The protections afforded to solicited plaintiffs depend largely on the effectiveness of certain sections of the class action rule. It is important to determine when in the chronology of the case these protections become applicable; there may be a danger that they will never attach or will attach too late in the case to be useful. Although the complaint will indicate that a class action is being brought, such a suit is not necessarily treated as a class action from the time it is filed.[64] Section 23(c)(1) reads: "[A]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." If Rule 23 does not apply before that determination is made, the value of the rule as a shield for solicited plaintiffs is severely impaired. For purposes of solicitation, one must determine whether a class action should be treated as such from the date of its filing.

The Advisory Committee notes accompanying Rule 23 state that under 23(c)(1), the court is to determine as early as practicable whether an action brought as a class action is to be so maintained.[65] "A negative determination means that the action should be stripped of its character as a class action."[66] One inference which can be drawn, of course, is that the suit should be treated as a class action for purposes of the other

63. *Id.* at 100.

64. Many lawsuits with class allegations are terminated before any ruling on class status is made. American Bar Foundation Class Action Study (prelim. unpublished data).

65. *Notes of the Advisory Committee on Rules*, 39 F.R.D. 69, 104 (1966).

66. *Id.*

sections of Rule 23 unless and until the negative determination is made.

A case frequently cited for the proposition that a suit is to be treated as a class action from the time of filing is *Philadelphia Electric Co. v. Anaconda American Brass Co.*[67] In that case, a proposed settlement of the class claims reached by the named plaintiffs and three of 13 defendants was ordered held in abeyance because no notice could be given to the class, as required by Rule 23(e). The class could not be notified because no class had been determined or even identified to the court. Nevertheless, because the suit had been filed initially as a class action, the court felt obliged to delay any decision on the settlement offer until after class status had been granted or denied, and the rights of potential class members adequately protected.

In 1969, a district court in New York relied on *Philadelphia Electric* to hold that a class action existed even without an explicit determination under Rule 23(c)(1).[68] Consequently, after the original named plaintiff's claim had become moot, the court allowed members of the class to intervene as of right under Rule 24(a),[69] as persons whose interests would be affected by the class action and would not be adequately protected by the existing parties. Because the named plaintiff was a proper representative of the purported class at the time he filed the suit, and because the suit was treated as a class action from the time it was filed, the whole action did not fail when the original named plaintiff's case became moot.

The United States Court of Appeals for the Ninth Circuit has also ruled on the issue, at least for the limited purpose of determining jurisdiction. In *City of Inglewood v. City of Los Angeles*,[70] the court noted that it is proper for a district court to assume that a suit is a class action in order to determine jurisdiction. It also concluded that failure of some of the class members to meet the jurisdictional amount requirement should not be grounds for dismissing the entire action at the pleading stage; the district court should instead dismiss only those class members who did not meet the jurisdictional requirement, when they became identifiable.

67. 42 F.R.D. 324 (E.D. Pa. 1967). *See* text accompanying note 49 *supra*.
68. Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969).
69. FED. R. CIV. P. 24(a).
70. 451 F.2d 948 (9th Cir. 1971).

In all these cases the suit was treated as a class action from its inception, though not necessarily for all purposes. One recurring problem is the dismissal of the suit without the notice that would be required under Rule 23(e) if a positive certification ruling had been made. If an action is to be treated as class action *until* there is a negative certification ruling, then the action cannot be dismissed unless there has been Rule 23(e) notice to the class. Some cases have so decided. Others have ruled that notice of dismissal is not required prior to certification. The unifying principle seems to be the court's concern for the rights of the purported class and the prejudice, formal or informal, that dismissal without notice would cause.

In *Philadelphia Electric*, the settlement of the class claims was with prejudice and prior to any certification ruling. The court noted the binding effect of the settlement on the class and stated that "it is imperative that no final result be achieved as to any party without notice to those potentially affected thereby."[71]

Another case, *Yaffe v. Detroit Steel Corporation*,[72] did not involve an attempted settlement of the class claims, but an attempt by the plaintiffs to amend their complaint to strike the class allegations prior to any ruling on certification. The court held that Rule 23(e) prohibited dismissal of the class action without notice to the potential class members. The purported class (shareholders in the corporation) had received proxy materials which mentioned that the suit had been filed as a class action, and some of them might have relied on the class suit and refrained from filing their own actions. The court was concerned that striking the class claims without notice could result "in an unwitting forfeiture of their rights,"[73] because the statute of limitations might run while the class members continued in their reliance. The court also refused to allow dismissal of the class allegations without notice because "with the possibility of amendment as of right, the named plaintiffs have additional leverage when negotiating for settlement of their individual claims."[74]

Not all courts have declined to strike the class allegations

71. 42 F.R.D. at 328.
72. 50 F.R.D. 481 (E.D.N.C. 1970).
73. *Id.* at 483.
74. *Id.*

without notice to the class members. In *Berse v. Berman*,[75] certification had been granted and conditioned upon the plaintiffs notifying the class and posting a $25,000 bond to cover the costs of future notice. Two months later, the plaintiffs and defendants submitted a stipulation that the class allegations should be stricken, because the plaintiff could not afford to meet the conditions of certification. The judge dismissed the class allegations without requiring notice. While acknowledging that the purpose of notice is to protect absent class members, the judge concluded that the likelihood of prejudice to the class members should be determined on a case by case basis. In this instance, the judge found that the danger of prejudice was not significant enough to require newspaper notice,[76] because (1) the plaintiffs intended to prosecute individually, thus permitting persons who would have been class members to intervene under Rule 24 even if the statute of limitations had run;[77] (2) there was no offer of settlement; and (3) the statute of limitations had not run on three of the four claims. However, the court did require notice in the *New York Law Journal* in order to counteract the effect of the notice of certification as a class action which had appeared there earlier.

In *Elias v. National Car Rental System, Inc.*,[78] the named plaintiff instructed his attorney not to oppose a motion to dismiss to be filed by the defendants. The defendants filed the motion, but requested that it not be granted unless there was notice to the purported class. The opinion states,

> The court does not perceive it has any duty to notify those whom plaintiff's counsel might claim to be class members of the proposed dismissal. Rule 23 does not require notice under these circumstances and to do so is in a sense merely soliciting a client for plaintiff's counsel under the aegis of the court. This would be improper.
>
> The court made inquiry of counsel and has noted the statement by defendants' counsel in the brief on file and is satisfied that this is not a case where plaintiff has been

75. 60 F.R.D. 414 (S.D.N.Y. 1973). This case was decided prior to American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). In *American Pipe*, the Court stated, "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the action been permitted to continue as a class action." *Id.* at 554.

76. 60 F.R.D. at 417.

77. *Id.*

78. 59 F.R.D. 276 (D. Minn. 1973).

> "bought off" or some side settlement has been made with him. Further, it is clear that a dismissal of the case, without prejudice, is yet well within any statute of limitations if plaintiff's counsel has another plaintiff and wishes to start anew. No prejudice can result thereby and to date no other member of the proposed class has attempted to intervene nor is there any showing that anyone is relying on the pendency of this present action.[79]

As these cases demonstrate, courts tend to decide the applicability of the notice requirements of Rule 23(e) on a case by case basis. If the court perceives a harm to the class which Rule 23 is capable of preventing, the court will apply the rule even though there has not been a formal ruling on class status. If the court does not perceive such harm, the case is treated as an individual suit until formal class certification.

The same approach should apply in the solicitation context. If solicitation of class actions is allowed, then those provisions of Rule 23 which protect against solicitation abuses should become effective, in the court's discretion, at the time they become pertinent. Class action status need not be accorded for all purposes from the time of filing—only for the limited purpose of protecting the class members from the abuses of solicitation.

If the solicitation rules are liberalized, it does not follow that all class actions will involve solicitation. It is therefore necessary to have some system to notify the judge that solicitation has taken place. In some instances, the court can rely on the defendant's attorney to reveal the plaintiff's ethical lapses. But often the defendant will not be aware of any improper conduct, or will not be opposed to it. For example, counsel for defendant presumably would have no objection to the plaintiff's attorney selling the class claim too cheaply. To forestall such possibilities, the court might well require an affidavit by the soliciting attorney at the time the class suit is filed, stating whether solicitation had taken place or would take place. The affidavit would alert the court and defense attorneys of the existence of the solicitation and the possible need for the extra protections afforded by Rule 23, triggering the court's active role in preventing abuses.

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79. *Id.* at 277.

Defendants

Opponents of solicitation claim that defendants would be forced to defend or settle many frivolous claims that would not have been brought without solicitation. If solicitation of one client is bad, solicitation en masse must be even worse. At least this is the reasoning of those who urge that solicitation of class actions is particularly dangerous because of the potentially large liability and cost of defense. It is argued that class actions are a weapon with which to blackmail defendants, and solicitation would hone that weapon to razor edge.

Emotion laden terms such as "blackmail" are not a substitute for a careful examination of the claim. Professor Handler speaks of the *in terrorem* effect caused by the existence of a class action rule.[80] If we make certain simplifying assumptions,[81] we can examine this effect and its relationship to the class action rule and solicitation.

Blackmail without solicitation. The additional pressure on defendants to settle which occurs solely because of the existence of a class action rule is equal to the probability that the defendants will lose on the merits multiplied by the number of plaintiffs (both named plaintiffs and class members) who would not bring suit without a class action rule, multiplied in turn by the average size of each claim, plus the difference between cost of defending the class suit and cost of defending individual suits.[82] As the probability that the defendant will

80. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 9 (1971).

81. These assumptions are that the defendants will act in an economically rational manner based on information known to them, that all plaintiffs have the same size average claim, and that, if judgment is awarded, all class members will collect the full amount due them so that the award is exhausted.

82. The increased pressure to settle (IP) caused by the existence of the class action rule is the difference between the expected cost of losing the class action (E^c) and the expected cost of losing all the individual suits which would be brought in the absence of a class action rule (E^i). This is symbolized as follows:

$$IP = E^c - E^i = LS\,(P_1 + P_2 + (C^c - C^i)$$

where: L = probability that the defendant will lose the suit on the merits if it goes to trial;
S = average size of each named plaintiff's or class member's claim;
P_1 = number of named plaintiffs in the class action who would not file individual suits in the absence of a class action rule;
P_2 = number of class members in the class action who would not file individual suits in the absence of a class action rule;
C^c = cost to the defendant of defending the class suit;
C^i = cost to the defendant of defending all of the individual actions that would be brought in the absence of a class action rule.

lose approaches 100 percent, the pressure to settle caused purely by the class action rule increases. It approaches, as a maximum, a quantity equal to the number of plaintiffs who would not bring suit without a class action rule, multiplied by the average size of each claim, plus the difference in cost of defending the class or individual actions. In some cases, the increased pressure caused by the class action rule may actually be zero or less, that is, an advantage to defendants caused by a possible economy of scale in defending class actions. There are the cases in which the savings in defense costs caused by the economy of scale of defending is greater than the increased expected losses caused by those plaintiffs bringing suit who would not have litigated but for the class action.

The situations which are most likely to be called blackmail are those in which the probability of the defendant losing on the merits is small. But as this probability becomes smaller the increased pressure to settle also becomes smaller.[83] Conversely, as the probability that defendants will lose on the merits becomes larger, the pressure to settle becomes larger. Thus, in fact, the class action rule promotes the efficient use of court resources and affords a kind of rough justice in that when a defendant is most probably legally liable, the pressure to settle is greatest.

The effect of solicitation. Assuming that the "blackmail" element is a problem inherent in the class action itself, what additional factors would be introduced if solicitation of class actions were permitted?

First, there is the possibility that additional *individual* suits might be brought. This could happen if attorneys fraudulently solicited individual suits under the guise of class actions, or if suits legitimately solicited as class actions were denied class status and then continued as individual actions. As a practical matter, an avalanche of additional individual litigation is unlikely, and appropriate restrictions can easily be formulated.[84]

As mentioned earlier, there are three types of solicitations of class members: solicitation of the entire suit including the

83. However, even if the defendant is certain to win on the merits, thus negating much of the pressure, there may still be some *in terrorem* effect depending on the relative costs of defending the class and individual actions. The larger the economy of scale deriving from defending the class action, if any, the smaller will be the *in terrorem* effect.

84. *See* text accompanying note 95 *infra*.

first named plaintiff; solicitation of additional named plaintiffs only; and solicitation of direct representation of non-party class members. The latter two types of solicitation do not increase the total number of plaintiffs. The solicited persons would presumably be unnamed class members in any event, and the effect of successful solicitation is merely to shift their status from class member to named plaintiff, or to give them direct legal representation by an attorney while they remain unnamed class members. However, if the solicitation effort results in stronger named plaintiffs and better class representation, the probability that the defendant will lose on the merits may increase, and hence create increased pressure to settle.

Solicitation of the entire suit, including the first named plaintiff, has a different effect. Here, there is a class action that would not have been brought at all but for the solicitation, and the formulation of a class will undoubtedly increase the number of causes of action to be litigated. The net result is the *in terrorem* effect.[85]

Whether these various pressures to settle caused by solicitation are good or bad must be evaluated in the context of Rule 23. First, the extent to which allowing solicitation of class actions implements the purposes of the class action rule[86] must be considered; and second, any "pressures" directly attributable to solicitation must be evaluated in light of the pressure to settle caused by the class action rule itself. In many cases, increased pressure to settle caused by solicitation may be small when compared with the pressure inherent in the existence of the class action rule. Thus, the anxiety aroused by allowing solicitation of class actions may actually be a misplaced concern over the existence of the class action rule. It is also possible that the class action rule, with or without solicitation, is not the threat defendants perceive it to be.

Empirical evidence is required before any of the claims of disastrous potential consequences can be substantiated. If solicitation is allowed, comparative data for measuring the *in terrorem* effect will become available; there is no other way of acquiring accurate information. Of course, the mere acquisi-

85. This increase in the pressure to settle is related to the provision of forum purpose previously discussed; the pressure to settle is partly a result of increased access to the forum. *See* text accompanying notes 10-16 *supra*.

86. *See* text accompanying notes 17-22 *supra*.

tion of data is no reason to conduct an experiment. The reasons for changing the present rules are the benefits that solicitation will confer. But once solicitation is permitted, evidence will exist to test the arguments.

There is one final point regarding the charge of blackmail leveled at the class action and the concept of liberalized solicitation rules. As mentioned, the blackmail accusation seems most justified when the probability that the plaintiffs will prevail is small, but the large number of plaintiffs and the size of the aggregate claim makes *any* risk unacceptable to the defendant. This situation may have been considerably ameliorated by a recent decision. In *Eisen v. Carlisle & Jacquelin*,[87] the Supreme Court held that each class member who could be identified with reasonable effort must receive individual notification at the expense of the named plaintiffs. The larger the number of identifiable class members, the larger the amount the plaintiff must expend in notice costs. This cost factor can reasonably be expected to act as a deterrent to the solicitation or filing of class actions when there is only a small chance of prevailing on the merits.

Thus, the argument that the class action context is a particularly dangerous one in which to permit solicitation may not be accurate, either because the class action does not cause an inordinate *in terrorem* effect or because solicitation of class actions would not add significantly to whatever effect does exist. Even assuming "terrorizing" pressure, the magnitude of the effect must be balanced against the positive purposes to be served by solicitation of class actions and the negative aspects of prohibiting it.

The Courts

One frequently repeated objection to solicitation is that the courts cannot accomodate the extra litigation that will be produced. The basic assumptions are that we must allocate our scarce judicial resources, and that it is better for client-initiated suits to reach the courts. There is an assumption that client-initiated suits are more likely to be non-fraudulent, non-

87. 417 U.S. 156 (1974).

frivolous, and non-oppressive than attorney-initiated actions. A secondary assumption is that, as a matter of policy, judicial resources should benefit those who experience sufficient outrage to seek an attorney.[88]

Christensen argues, on the other hand, that prohibition of solicitation has the effect of allocating the litigative mechanism to the strong, the wealthy, and the knowledgeable, while discouraging litigation by the poor, the weak, and the ignorant.[89] He urges that the proper objective should not be to discourage litigation but to allocate judicial resources rationally.[90] This objective is hindered by the proscription on solicitation, which does not provide a rational allocation.

What additional burden will solicitation of class actions impose on the courts? One measure of the burden may be calendar congestion; another, the cost of handling each suit; and a third, the total cost of all suits that are brought. If the purpose of the court system is to reduce the total number of plaintiffs in order to reduce calendar congestion or to reduce the total cost of the court system to society, then solicitation of class actions obviously works against these goals. If the primary goal is not to minimize cost but to maximize access to the courts for those who have redressable grievances—if the medieval notion that litigation is *per se* bad should be discarded by an enlightened society[91]—then solicitation of class actions would serve the purpose of maximizing access to the courts.

First, solicitation will increase the flow of information to those who would not otherwise have had the knowledge or opportunity to redress their grievances. The objection that frivolous claims would be encouraged is a questionable one and may not withstand empirical analysis. In any event, frivolous suits are already proscribed by the Code of Professional Responsibility.[92] Furthermore, the objection simply may not be weighty enough to justify restricting the flow of information to those persons who have legitimate non-trivial claims.

Second, solicitation of class actions may actually increase judicial efficiency. It may minimize the overall cost, as a secondary result of achieving the primary purpose: maximizing

88. For a discussion and refutation of these assertions, *see* B. CHRISTENSEN, *supra* note 38, at 142-46.

89. *Id.* at 143.

90. *See id.* at 145-46.

91. *Cf.* Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 72 (1935).

92. ABA CODE, D.R. 2-109.

access to the courts. The effectiveness of solicitation is tied to the effectiveness of the class action itself. Uniting plaintiffs with similar grievances in a single class action may reduce net judicial resources expended.

The savings realized by consolidation may or may not be equal to the additional costs caused by increased access. But the primary goal of courts should not be minimization of cost. Simple cost-cutting can be achieved in any number of arbitrary ways; we could, for example, disallow suits by the poor or ignorant. The obvious unacceptability of this alternative points out the unacceptability of reaching essentially the same result indirectly, through anti-solicitation rules.

The Legal Profession

The arguments for and against solicitation based on its hypothetical effects on the legal profession involve fundamental policy questions that are not affected by a class action/individual action distinction. Christensen describes the basic arguments as follows:

> One value appears to predominate among those favoring the liberalization of present restrictions: It is the benefit to the public from vastly greater access to lawyers and their services. Similarly, one value stands out as most important among those favoring the preservation of the restrictions in their present form: This is the value most commonly spoken of as "preventing the commercialization of the practice of law"—preventing impairment of the professional milieu and thus of the lawyer's ability to perform his difficult functions in conformance with basic professional norms.
>
> The dichotomy is, then, a simple one: The prospect of making lawyers' services more readily available to people of moderate means through relaxation of the rules against advertising and solicitation must be weighed against the threat such modification might pose to the professional milieu and thus to the lawyer's ability to conform to high standards of conduct in the performance of his professional functions. The weighing may be less simple than the dichotomy, however.[93]

All that can be added is that for those unwilling to gamble on the complete liberalization of anti-solicitation rules, the class

93. B. CHRISTENSEN, *supra* note 38, at 158.

action, with its special protections and limited scope, could serve as a compromise testing ground for empirical evaluation of the two positions.

The General Public

Finally, there is the claim that solicitation will diminish public confidence in the profession by reducing the practice of law to the level of a commercial enterprise. First, that statement involves an assumption that a high level of confidence presently exists. The public reaction to the recent Watergate scandals and the many lawyers implicated would appear to dispel any notion of widespread confidence in the profession. And lest this be thought a temporary phenomenon, it is instructive to consider the lines written by Carl Sandburg over 50 years ago:

> Why is there always a secret singing
> When a lawyer cashes in?
> Why does a hearse horse snicker
> Hauling a lawyer away?[94]

Assuming that the fear is of a still greater decline in public esteem, it is submitted that the "commercial" nature of an enterprise is not itself objectionable; rather, public cynicism is generated when those affected by a commercial enterprise are abused by it. The class action rule and the nature of the class action itself offer protection against abuse for those primarily affected by solicitation: plaintiffs, defendants, and the courts. This, taken together with the benefits afforded by solicitation and the utility of the approach, should outweigh any fear of increased loss of confidence.

IV. A Bounded Right

Allowing attorneys to solicit class actions does not mean that the right must or should be unrestricted. In most cases, the courts will be able to control abuses by use of Rule 23. But there may still be those who misuse the right.

For example, one can envision hordes of lawyers scrambling into hospitals and funeral parlors to sign up the victims of mass accidents for class action litigation. No provision of Rule 23 would operate directly to prevent or redress this

94. C. Sandberg, *The Lawyers Know Too Much*, in Smoke and Steel (1920).

practice. However, there should be no objection to a restriction on the time, place, and manner of solicitation, to ensure that potential litigants will receive the benefits of solicitation without being subjected to annoyance or imposition. While an attorney should be permitted to solicit clients, he need not be allowed to climb, pen in hand, into an accident victim's hospital bed.

Narrowly drawn disciplinary rules for fraudulent and unacceptable conduct in soliciting class actions would be an appropriate and reasonable adjunct to a liberalized rule. A good starting point is the new Canon 2 proposed by one legal commentator.[95] Its scope, of course, would have to be modified to cover solicitation of class actions instead of solicitation in general.

There is the further possibility that if solicitation of class actions is permitted while solicitation of individual suits is not, some attorneys would work around the edges of the distinction. The pretense of soliciting a class suit would be used to contact potential clients soliciting for suits that have no real possibility of achieving class status. The attorney might comply with Rule 23(c)(1) by moving for judicial determination of class status, fully expecting that the motion would be denied; the action would then proceed as an individual action. A disciplinary rule would be drawn to deal with this problem, and exposing the fact of fraudulent solicitation would be hardly more difficult than establishing under present rules that solicitation has occurred. In fact, given the affidavit procedure described previously, it would be easier in some circumstances. The burden of proving reasonable belief that class status could be achieved properly would fall on the soliciting attorney, as a fair condition on allowing solicitation.

In sum, there is much to be gained by permitting attorneys to solicit clients: solicitation would make the right of judicial redress of grievances a more meaningful one; it would increase the flow of information to the public, and facilitate access to the courts. For those who are fearful that the potential abuses

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95. A lawyer has the right to engage in advertising and solicitation to aid in securing professional employment. The methods of advertising and solicitation in which lawyers engage should not deceive the public. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions.

Note, *Advertising, Solicitation and the Professional Duty to Make Legal Counsel Available*, 81 YALE L.J. 1195 (1972) (footnotes omitted).

of such a practice would overshadow any social benefits, a rule allowing solicitation only of class action suits would be a means of testing that proposition in a limited context. There is authority for the move in the *NAACP v. Button* line of cases, and it is clear that the class action context provides particularly appropriate safeguards against the dangers of solicitation, and enhances its benefits. In a legal system that must make the courts a meaningful asset to all of the people, solicitation of class actions would be a small but important step.